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In the Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, APPELLANT

v.

THOMAS D. BUFFUM AND PERRY T. PURDY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No.

UNITED STATES OF AMERICA, APPELLANT

v.

FRED D. BROWN AND FRED J. PURDY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, pp. 6-11) has not yet been reported.

JURISDICTION

The count of the indictment involved in this appeal was filed under Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1. The order of the district court dismissing the count as to appellees (included in its opinion), on the ground that Section 1 of the Sherman Act is inapplicable to the offenses charged against them, was entered on April 17, 1962

(App., *infra*, p. 11). The notice of appeal was filed on May 8, 1962. The jurisdiction of this Court to review the order on direct appeal is conferred by 18 U.S.C. 3731. *United States* v. *Hutcheson*, 312 U.S. 219; *United States* v. *Borden Co.*, 308 U.S. 188.

QUESTION PRESENTED

Whether a corporate officer may be prosecuted under the Sherman Act for antitrust violations committed in the course of his corporate duties.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 14 of the Clayton Act, 38 Stat. 736, 15 U.S.C. 24, provides:

> That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the

individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or imprisonment for not exceeding one year, or by both, in the discretion of the court.

STATEMENT

Count one of a two-count indictment returned on December 5, 1961 charged five corporations and eight officials thereof with a conspiracy to fix the resale price of brazing alloys, in violation of Section 1 of the Sherman Act (R. 2-7). Count one further alleged that "the officers, directors, agents or employees" of the corporate defendants "authorized, ordered or did" the acts with which each corporate defendant was charged "for or on behalf of said defendant while actively engaged in the management, direction or control of its affairs" (R. 4). The second count charged the same acts as violations of Section 14 of the Clayton Act by the eight individual defendants (R. 9).

Six of the individual defendants pleaded *nolo contendere* to count two, and count one was dismissed as to them. On March 5, 1962 the remaining two individual defendants—the appellees Fred D. Brown and Fred J. Purdy[1]—moved to dismiss count one as

[1] In the indictment Brown was identified as the Marketing Manager and Purdy as the Sales Manager of the Westing-Arc Department of Westinghouse Electric Corporation (R. 3).

to them, on the ground that corporate officials who violate the antitrust laws in their representative capacity may be charged only under Section 14 of the Clayton Act and not under Section 1 of the Sherman Act (R. 13). After hearing oral argument, the district court on April 17, 1962, granted appellees' motion to dismiss, holding that "Section 14 of the Clayton Act was intended to be the exclusive remedy against officials acting in their corporate capacity" (App., *infra*, p. 10).

THE QUESTION IS SUBSTANTIAL

This case presents the same issue as *United States* v. *Wise*, No. 488, this Term, probable jurisdiction noted, 368 U.S. 945, and in *United States* v. *Kniss*, No. 762, and *United States* v. *Staley*, No. 882, this Term, both pending on jurisdictional statement. The question is whether corporate officials may be prosecuted under the Sherman Act for antitrust violations committed in the course of their corporate duties. The district court in the present case—as did the district court in the *Wise* case—dismissed an indictment under the Sherman Act, against the individual defendants, on the ground that corporate officers may be prosecuted only under Section 14 of the Clayton Act. The question is important in the administration of the Sherman Act and, for the reasons set forth in our briefs in the *Wise* case, we believe that the ruling of the district court was erroneous.

The *Wise* case was argued on April 16, 1962. We suggest that the Court defer acting on this appeal until *Wise* has been decided. If the Court reverses in

Wise, summary reversal in this case would be appropriate. If, on the other hand, the Court were to affirm in *Wise*, the government would then be prepared to dismiss this appeal, or, alternatively, the Court could summarily affirm the judgment.

CONCLUSION

This appeal presents a substantial question of public importance. In view of the pendency of the *Wise* case, however, the Court should defer acting on this appeal until *Wise* has been decided.[2]

Respectfully submitted,

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MAY 1962

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[2] The government has suggested that the Court should similarly defer acting on the appeals in the *Kniss* and *Staley* cases, Nos. 762 and 882, this Term, until *Wise* has been decided.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Cr. 1105

UNITED STATES OF AMERICA

- against -

ENGELHARD-HANOVIA, INC.; ENGLEHARD INDUSTRIES, INC.; HANDY & HARMAN; UNITED WIRE & SUPPLY CORPORATION; WESTINGHOUSE ELECTRIC CORPORATION; WILLIAM J. WAGNITZ; JOSEPH NICKERSON; JOHN F. THOMPSON, JR.; JOHN W. COLGAN; PAUL G. FELD; JAMES G. LANDRIGAN; FRED D. BROWN; and FRED J. PURDY, DEFENDANTS

OPINION

(Filed April 17, 1962)

Appearances:

CASHIN, D. J.

Defendants, Fred D. Brown and Fred J. Purdy, have moved to have Count One of the indictment dismissed as to them pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, on the ground that Count One does not state facts sufficient to constitute an offense against the United States by said defendants, or in the alternative, for an order directing the United States to elect between the penalties provided for in Section 1 of the Sherman Act, 15 U.S.C. § 1, and those provided for in Section 14 of the Clayton Act, 15 U.S.C. § 24.

The indictment consists of two counts. Count One charges five corporations and eight employees with

conspiring to fix the resale prices of brazing alloys and to require adherence to those prices by distributors in violation of Section 1 of the Sherman Act. Count Two alleges the identical acts as Count One but charges that the employees who authorized or did the acts thereby violated Section 14 of the Clayton Act. On January 18, 1962, defendants, Engelhard-Hanovia, Inc. and Handy & Harman, pleaded guilty to Count One, United Wire & Supply Corporation and Westinghouse Electric Corporation pleaded not guilty to Count One, and the indictment was dismissed as to defendant Engelhard Industries, Inc. Also, on January 18, 1962, defendants, William J. Wagnitz, Joseph Nickerson, John F. Thompson, Jr., John W. Colgan and Paul G. Feld, pleaded *nolo contendere* to Count Two and Count One was dismissed as to them. On February 23, 1962, defendant James G. Landrigan pleaded *nolo contendere* to Count Two and Count One was dismissed as to him.

The indictment charges these employees solely with acting in their representative capacities for the defendant Westinghouse Electric Corporation and not as individuals acting in their own behalf. Thus, the sole issue presented here is whether corporate officials acting in their representative capacities can, as the Government contends, be indicted under Section 1 of the Sherman Act, or whether, as movants claim, they can only be indicted under Section 14 of the Clayton Act.

Section 1 of the Sherman Act, 15 U.S.C. § 1, passed in 1890 and amended in 1955, states:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *: Every person who shall make any contract

> or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 14 of the Clayton Act, 15 U.S.C. § 24, passed in 1914, states:

> "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

Prior to 1955 the maximum penalties under both statutes were identical and the Department of Justice continued to indict individuals under the Sherman Act even after the Clayton Act was enacted. Apparently, defendants did not raise the point of which statute was the proper one since the penalties under both were identical. However, in 1955 Congress amended Section 1 of the Sherman Act to increase the maximum fine from $5,000 to $50,000 and it is now important that individuals be indicted under the proper statute. In the case at bar the Government has indicted the individual defendants under both statutes.

Recently there have been seven district court decisions bearing directly on the Section 1—Section 14 issue. In five of these cases the courts found that Section 14 of the Clayton Act is the only proper charging statute and, accordingly, dismissed indictments of corporate officials under the Sherman Act. *United States* v. *National Dairy Products Corp.*, 196 F. Supp. 155 (W.D. Mo. 1961); *United States* v. *A. P. Woodson Company*, CCH Trade Reg. Rep. par. 70,112 (D.D.C. Sept. 21, 1961); *United States* v. *American Optical Co.*, CCH Trade Reg. Rep. par. 70,156 (E.D. Wis. Nov. 3, 1961); *United States* v. *Milk Distributors Association Inc.*, Crim. No. 25658 (D.C. Md. 1961) and *United States* v. *General Motors Corp.*, No. 30,132—Crim. (S.D. Cal. 1962). In *United States* v. *American Van Lines, Inc.*, CCH Trade Reg. Rep. par. 70,213 (D.D.C. Jan. 29, 1962) the defendants' motion to dismiss was denied and this Court has been informed that in *United States* v. *Packard Bell Electronics Corp.* (S.D. Cal. 1962), Judge Yankwich denied, without opinion, motions by defendants to dismiss counts based on Section 1 of the Sherman Act and motions to dismiss counts based on Section 14 of the Clayton Act as duplicitous.

The Government contends that prior to the enactment of the Clayton Act in 1914, it was established that corporate officials were criminally liable for violations of the Sherman Act committed in their corporate capacity; that the legislative history of the Clayton Act shows that Congress intended Section 14 of the Clayton Act to supplement, but not to supersede or limit, the existing liability of corporate officials under the Sherman Act for antitrust violations committed in their corporate capacities; that the post-1914 criminal enforcement of the Sherman Act, the judicial decisions, and the 1955 increase in the Sherman Act's criminal penalties, all show that Section 14

does not provide the exclusive method for prosecuting corporate officials for antitrust violations.

I cannot accept the Government's contentions. I find that Section 14 of the Clayton Act was intended to be the exclusive remedy against corporate officials acting in their corporate capacity. To hold that Section 1 of the Sherman Act applies to individuals acting in their corporate capacity would have the effect of nullifying Section 14 of the Clayton Act. I reject the Government's contention that Section 14 was intended to supplement the Sherman Act by permitting the prosecution of top corporate officials who did not participate in antitrust violations to a sufficient degree to make them conspirators under the Sherman Act. I find that Section 1 of the Sherman Act and Section 14 of the Clayton Act are mutually exclusive.

I do not find from either the pre-1914 or post-1914 cases that it is clear, as the Government contends, that corporate officials were criminally liable under the Sherman Act for violations committed in their corporate capacity. To the contrary, there appears to have been much doubt on the point and no direct ruling that the Sherman Act was or was not applicable to the situation at bar. Nor does the legislative history of the Clayton Act shed much light upon the subject. Thus, while Representative Floyd stated that:

> "* * * under the Sherman law as it is now written you can convict an officer for violation of its provisions, but his acts must constitute the whole offense, or he must be a conspirator, and come within the rules of law governing conspiracies, but under this provision if he does any of the acts which constitute in whole or in part that violation then he may be convicted as an individual." 51 Cong. Rec. 16320.

Senator Culberson stated:

> "Heretofore, under the Sherman Act, if a corporation were guilty of a violation of that act, the guilt of that corporation would not be visited upon the individual director or agent or officer who authorized or committed or induced the act. This section [Section 14 of the Clayton Act] is intended to supply that deficiency and to visit upon the officers and agents of the corporation responsible for the conduct punishment for the act of the corporation." 51 Cong. Rec. 14324.

To accept the Government's contentions in this case would not only nullify Section 14 of the Clayton Act but would also mean that the defendants herein, who acted, solely in their corporate capacities, would be subject to a $55,000 fine and two years in jail. This would be so even though individuals who act in their own behalf could only be indicted under the Sherman Act and thus subject only to a $50,000 fine and one year in jail. I do not believe that Congress intended to make individuals who act in their own behalf liable only under the Sherman Act and at the same time make individuals who act in their corporate capacity liable under both the Clayton and Sherman Acts and thus subject to harsher penalties.

Defendants' motion to dismiss Count One of the indictment is granted.

It is so ordered.

Dated: New York, N. Y.
April 17th, 1962.

JOHN M. CASHIN
United States District Judge

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